**IN THE SUPREME COURT OF ARIZONA**

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| KAREN FANN, in her official capacity as President of the Arizona Senate; WARREN PETERSEN, in his official capacity as Chairman of the Senate Judiciary Committee; and the ARIZONA SENATE, a house of the Arizona Legislature,<br><br>Petitioners,<br><br>vs.<br><br>THE HONORABLE MICHAEL KEMP, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,<br><br>Respondent Judge,<br><br>AMERICAN OVERSIGHT,<br><br>Real Party in Interest. | Case No. CV-21-0197-PR<br><br>Arizona Court of Appeals<br>Division One<br>No. 1 CA-SA 2021-0141<br><br>Maricopa County Superior Court<br>Case No. CV2021-008265 |

# BRIEF OF *AMICI* PHOENIX NEWSPAPERS, INC. AND KATHY TULUMELLO

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## Interest of Amici

Pursuant to this Court's August 30, 2021 Order and Arizona Rule of Civil Appellate Procedure 16(a)(3), *Amici* Phoenix Newspapers, Inc. and Kathy Tulumello (together, "PNI") file this brief on their own behalf and without an external sponsor as a news organization. PNI sought public records related to the audit at issue from both the Arizona Senate and from Cyber Ninjas, Inc. through public records requests, which were improperly denied. PNI has filed a special action in Maricopa County Superior Court challenging those denials, and rulings by this Court in the instant case could materially affect PNI's interests in that pending litigation.

## Introduction

This case concerns the Arizona Senate's stated desire to monitor the integrity of Arizona's elections by conducting an audit of voting records in Maricopa County in the November 2020 election (the "Audit"). Rather than perform this core government function itself, the Senate outsourced the effort to a Florida corporation, Cyber Ninjas, Inc. ("Cyber Ninjas"). When the Senate, Sen. Pres. Karen Fann and Judiciary Committee Chairman Warren Petersen (together, the "Senate")

subsequently received public records requests from American Oversight ("AO") related to the Audit (the "Audit Records"), the Senate claimed that (1) "legislative immunity" shielded the Audit Records from Arizona's pubic records laws, (2) the Audit Records held by Cyber Ninjas were not public records because the Senate did not "physically" possess them, and (3) the Senate could not be compelled to call upon Cyber Ninjas to share the Audit Records with the Senate.

The Senate's attempt to avoid its obligations under Ariz. Rev. Stat. § 39-121 et seq. (the "Public Records Law") was rejected by the Hon. Judge Michael Kemp, and similarly rejected shortly thereafter by the Arizona Court of Appeals in a unanimous, unpublished Memorandum Decision dated August 19, 2021 (the "COA Op.").

That decision is not precedential under Arizona Supreme Court Rule 111(c); indeed; no appellate mandate has issued yet. *See* Ariz. R. Civ. App. P. 24. Still, the appellate panel correctly decided the issues in its opinion, which was rooted in well-established law. As such, this Court should decline to accept review of the instant Petition for Special Action (the "Petition") to end the Senate's delays in disclosing the Audit Records. Fundamentally, the Petition seeks judicial countenance of the Senate's

maneuvers to circumvent its statutory duty to produce public records promptly — a duty from which the legislature has not exempted itself.

However, if the Court is inclined to accept jurisdiction, it should deny the relief requested and affirm the Court of Appeals' ruling, which finds abundant support in Arizona law and which vindicates the wording, intent and purpose of the Arizona Public Records Law. As this Court has long observed: "Historically, this state has always favored open government and an informed citizenry." *E.g.*, *Arizona Newspapers Ass'n, Inc. v. Superior Court*, 143 Ariz. 560, 564 (1985). The Public Records Law would be rendered meaningless if a government entity could merely contract out a core government function to a private entity agent and thereby thwart the public's ability to see how public dollars were being spent to perform the public's business.

## Argument

### I. JURISDICTION SHOULD BE DENIED.

Whether to accept or deny jurisdiction in a special action is "a highly discretionary decision." *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 485-86 (2006). Factors this Court considers in deciding whether to accept jurisdiction include whether the petition raises pure

questions of law of statewide importance and "there is no 'equally plain, speedy and adequate remedy by appeal.'" *Quality Educ. & Jobs Supporting I-16-2012 v. Bennett*, 231 Ariz. 206, 207 (2013) (quoting Ariz. R. S.A. 1(a)).

This Court should exercise its discretion to deny jurisdiction. It would be premature, and cause unnecessary delay, to accept jurisdiction because (a) no final judgment has been issued; (b) the appellate process provides an equally plain, speedy and adequate remedy; and (c) neither court below abused its discretion.

### A. Accepting Jurisdiction Would Be Premature and Cause Unnecessary Delay.

The Senate's Petition is, for all practical purposes, an interlocutory appeal. Judge Kemp has not issued a final judgment. *See* APPV1-0002-03, 0006-07; *see also* Ariz. R. S.A. 6 (judgment in special action shall be in form of judgment in any civil action). The Superior Court order directed the Senate to produce responsive documents to AO. APPV1-0003. But the accompanying Minute Entry explicitly states that the order "does not preclude the Senate Defendants from challenging the disclosure of any document or communication based upon privilege or any other valid legal objection." APPV1-0007. Because no records have been

produced and no exemptions or privileges (other than blanket immunity) have been claimed, Judge Kemp has not made a final determination regarding which specific materials are public records that must be provided to AO. Jurisdiction at this juncture is therefore premature.

This Court discourages interlocutory special actions because they "often frustrate[] the expeditious resolution of claims, unnecessarily increase[] both appellate court caseload and interference with trial judges, harass[] litigants with prolonged and costly appeals, and provide[] piecemeal review." *City of Phoenix v. Yarnell*, 184 Ariz. 310, 315 (1995). The Court can avoid those dangers by denying jurisdiction.

The parties are likely to challenge any adverse rulings regarding which documents are non-exempt public records that must be produced. These all-but-inevitable follow-on appeals, not to mention the Senate's promised challenge to Judge Hannah's order in PNI's special action, would add unnecessary complexity, expense and burdens to the courts and the litigants. PNI respectfully suggests that this Court should deny jurisdiction now so that it may encourage the resolution of issues below and avoid piecemeal appeals.

### B. There Is an Equally Plain, Speedy and Adequate Remedy by Appeal.

Relatedly, accepting jurisdiction here is unnecessary because the appeals process provides an equally plain, speedy and adequate remedy. Here, as in any special action, once a final judgment is entered, the Senate may file an appeal in the same manner as any civil action. *See* Ariz. R. S.A. 8(a). That is this Court's preferred procedure, and it should be followed here.

### C. The Court of Appeals and Superior Courts Decided the Issues Correctly.

This Court also should deny jurisdiction because the lower courts' rulings were correct as a matter of law. All four judges to consider the arguments the Senate raises in this action — Judge Kemp and three Court of Appeals judges — came to the same conclusion: those arguments are without merit.

To obtain the special action relief it seeks from this Court, the Senate "must establish that the [lower] court's ruling is arbitrary, capricious, or an abuse of discretion." *Tobin v. Rea*, 231 Ariz. 189, 194 (2013) (citing Ariz. R. S.A. 3(c)). Because the Senate cannot make that

showing, as discussed in detail in Section II, *infra*, accepting jurisdiction is unnecessary.

In sum, this Court should not accept jurisdiction because doing so would unduly complicate and protract these proceedings. The Public Records Law prioritizes swift resolution of public records requests. *E.g.*, *Phx. New Times, LLC v. Arpaio*, 217 Ariz. 533, 538 (Ct. App. 2008) (statute's requirement of prompt disclosure means "being 'quick to act' or producing the requested records 'without delay'") (citation omitted). Unnecessarily stretching out the litigation over the Audit Records would not serve the purposes of the statute or the needs of the public for information about this important exercise of legislative power.

## II. IF THIS COURT ACCEPTS JURISDICTION, IT SHOULD DENY THE RELIEF SOUGHT BY THE PETITION.

If the Court exercises its discretion to accept jurisdiction, it should deny the relief requested by Petitioners. The Senate's purported lack of physical possession of the materials at issue neither strips the documents of their status as public records nor relieves the Senate of its statutory duties to maintain, preserve and produce them, whether its "custody" of the records is direct or via its agent, Cyber Ninjas. The Senate's legislative immunity arguments fail because the immunity is wholly

inapplicable in this special action, and even if it did apply, the Senate's refusal to comply with the Public Records Law is not a legislative function for which the Senate could be immune.

### A. The Senate Cannot Shirk Its Statutory Duties By Passing Off Public Records to a Third Party.

#### i. Physical Possession By the Government Is *Not* Required for Documents To Be Public Records.

The Senate cites no authority that limits Arizona's Public Records Law to only those records in the physical possession of a government entity or official. To the contrary, this Court has repeatedly held that records with a "substantial nexus" to government activities qualify as public records, and "[i]t is the nature and purpose of the document, not the place where it is kept, which determines its status." *E.g.*, *Salt River Pima-Maricopa Indian Cmty. v. Rogers*, 168 Ariz. 531, 538, 541 (1991) (citation omitted). A public record "does not become immune from production simply by virtue of the method the [government] employs to catalogue the document." *Lake v. City of Phx.*, 220 Ariz. 472, 481 (Ct. App. 2009), v*acated in part on other grounds,* 222 Ariz. 547, 549 (2009).

The Senate is incorrect in its assertion that the Court of Appeals "deviate[d] from [its] prior pronouncements" in holding that the Senate

has constructive possession of records in the physical custody of its agents. Pet. at 8. In a case the Senate's Petition ignores, the Court of Appeals held that police officers' *personal* cell phone records may be public records if they reflect the use of the phone for government purposes. *Lunney v. State*, 244 Ariz. 170, 179 (Ct. App. 2017). The fact that the individual employees (or their phone companies), not the government, would have had physical custody of those records did not factor into the Court of Appeals' analysis. *Id.*

The unpublished Court of Appeals case the Senate cites for this erroneous proposition does not support its position. In *Stuart v. City of Scottsdale*, the Court of Appeals held that financial records of the company that leases a golf course from the city were not public records; the city did not have them, and while the lease gave Scottsdale the right to obtain those records from the golf course operator, it had not done so. 2020 Ariz. App. Unpub. LEXIS 1306, at *23-25 (Ct. App. Dec. 8, 2020).

*Stuart* does not help the Senate here because the factual situation is essentially the mirror-image of this case. *Stuart* involved records in the possession of a *lessee* of city property which was paying the government for the privilege of operating the golf course (which is not a

uniquely governmental function). Here, the situation is reversed: the Senate is paying Cyber Ninjas with public funds to act as its agent in performing the Audit, a uniquely governmental function. The golf course lessee's financial records did not have a substantial nexus to any governmental function of the City of Scottsdale. Here, the records at issue are only those in Cyber Ninjas' possession that have a substantial nexus to the functioning of the Audit.

Embracing the Senate's illogical view of the Public Records Law would violate both clear statutory commands and the policy behind them. *E.g.*, *Carlson v. Pima Cty.*, 141 Ariz. 487, 490-91 (1984) ("access and disclosure is the strong policy of the law").

#### ii. The Senate Has A Statutory Duty to Maintain Public Records Regardless of Their Location.

Even if the Senate were correct that records are not public unless they are in the physical custody of an officer or public body (they are not), it still must maintain and release the public records at issue here. The plain language of the statute states that public officers such as President Fann and Chairman Petersen, and public bodies such as the Senate, "*shall maintain all records* . . . reasonably necessary or appropriate to maintain an *accurate knowledge* of their official activities and of *any of*

*their activities that are supported by monies from this state*[.]" A.R.S. § 39-121.01(B) (emphasis added).

This provision should operate to prevent the result the Senate seeks: a loophole allowing a public body or officer to evade the Public Records Law by refusing to keep records the public needs to evaluate their performance. It is not, as the Senate dismissively argues, a requirement for a "baseline" of a merely "rudimentary recordkeeping structure." Pet. at 21-22.

The records in Cyber Ninjas' possession that are necessary to provide the public with accurate knowledge of the Senate's activities and expenditure of public monies are public records the Senate has a duty to maintain, and its attempt to hide them from the public by having its agent hold onto them is a statutory violation that can and must be remedied by special action.

### iii. The Senate Has Constructive Possession of Public Records Through Cyber Ninjas.

As the Court of Appeals noted, COA Op. ¶ 19, the Senate acknowledges that Cyber Ninjas is its agent for performing the Audit. The Court of Appeals correctly concluded that because Cyber Ninjas is the Senate's agent, documents in its possession are in the Senate's

constructive possession. *Id.* ¶¶ 20-23. This was not some novel notion pulled out of thin air; it is a familiar concept in the law of agency. *See, e.g.*, *In re Phillips*, 491 B.R. 255, 262-63 (Bankr. D. Nev. 2013) ("An agent's possession or control of property on behalf of a principal is tantamount for many purposes to possession or control by the principal.") (quoting RESTATEMENT (THIRD) OF AGENCY § 8.12 cmt. b (2006)).

The Senate's counter-argument rests on the proposition that it cannot be compelled to invoke contractual provisions in its agreement with Cyber Ninjas to comply with its statutory duties. Pet. at 26-27. Compliance with the Public Records Law does not depend on the exercise of discretion to invoke a contractual option, however. Rather, it is a mandatory, "ministerial" act, as the Senate elsewhere admits. *See id.* at 29. The Senate cannot evade its legal obligations simply by signing a contract with a third party. *Cf. Moorehead v. Arnold*, 130 Ariz. 503, 505 (Ct. App. 1981) ("The promise of confidentiality standing alone is not sufficient to preclude disclosure. If the promise of confidentiality were to end our inquiry, we would be allowing a [government] official to eliminate the public's rights under A.R.S. [§] 39-121.") (citation omitted).

### iv. Applying the Public Records Law Here Would *Not* Open All Government Contractors' Files.

The Senate makes the red-herring argument that if AO were to prevail, each vendor to any government entity in Arizona "will be swept under the auspices of the PRA, and each individual document in its possession relating to its government contract will be presumptively subject to indefinite preservation and ultimately disclosure as a public record." Pet. at 24. But this parade of horribles is illusory.

The limiting principle the Senate pretends is missing, Pet. at 23-25, is the Public Records Law itself: records with *a substantial nexus to government activities that a public officer or public body is required to keep* are public records. The only consequence of a ruling against the Senate is that it and other public bodies will not be able to circumvent their legal duties by passing off their public records to third parties to conceal.

The Senate is required by statute to keep sufficient records to inform the public about its activities. Those records are public, no matter whose hands (or computers) they are in. The Senate's petition should be denied on this basis.

### B. Legislative Immunity Is Inapplicable Here.

The Senate contends that it and its members enjoy an all-encompassing, constitutional immunity from any lawsuit related to their legislative activities, including this and any other special action. Pet. at 9. It is wrong. This Court has never extended legislative immunity that far. To the contrary, this Court has strictly limited the scope of legislative immunity, holding that lawmakers are immune from liability only for their legislative acts, lest the principle create a class of "super-citizens" the law cannot touch. *Mesnard v. Campagnolo*, --- Ariz. ---, 2021 Ariz. LEXIS 238, at *9 (June 30, 2021).

Whether legislative immunity applies is a question of law. *Id.* at *8. Here, it is clear that legislative immunity does not extend to this action, and the Senate's actions in refusing to comply with the Public Records Law are not discretionary legislative activities.

#### i. Special Actions Do Not Impose Liability on Legislators or Legislative Bodies.

This Court has squarely held that legislative immunity does not apply in special actions such as this one. *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 476 P.3d 307, 314 (Ariz. 2020). Simply put, legislative immunity protects against criminal or civil *liability*. It does not block a

court order requiring lawmakers or legislative bodies to comply with their duties mandated by statute.

As the Senate states, legislative immunity bars civil liability "[w]hen legislators 'are acting within their legitimate legislative sphere.'" Pet. at 9-10 (quoting *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 136 (Ct. App. 2003)). The Senate also acknowledges that special actions seeking compliance with the Public Records Law are a contemporary form of what in the past would have been a writ of mandamus. Pet. at 28-29. But the Senate cannot escape the logical conclusion of these admissions: because a public records special action seeks a court order requiring the *performance* of a ministerial duty required by statute rather than imposing liability for *violating* a statutory or common-law duty, legislative immunity is inapplicable.

The Senate cites no case in which this Court has applied legislative privilege to bar a special action or other mandamus relief. To the contrary, the Court just last year firmly rejected the argument the Senate makes here. Addressing the Arizona Board of Regents' claim that legislative immunity barred the Attorney General's special action against it, this Court said:

> This argument fundamentally misperceives the concept of legislative immunity, which is extended to shield individual officials from personal liability for their legislative acts. *It has nothing to do with shielding governmental entities from challenges to claimed illegal actions.*

*Brnovich*, 476 P.3d at 314 (emphasis added). That ruling could not have been clearer, and it forecloses the Senate's legislative immunity argument here.

The Senate attempts to distinguish *Brnovich*, claiming that because it involved the Board of Regents rather than the Legislature, it is "best understood as implicitly reflecting the distinction between constitutional and common law immunities," Pet. at 12, the latter of which supposedly are "conditional and qualified," *id.* at 8. This interpretation of *Brnovich* is entirely untethered from the opinion's text, which makes no such distinction. *See* 476 P.3d at 314. That passage in *Brnovich* relies on the Court of Appeals' discussion of legislative immunity in *Fields*, which does not draw any distinctions between the scope of the constitutional and common-law versions of the immunity, and instead rejected the notion that the immunity applied differently to the redistricting commission, a body created by statute. 206 Ariz. at 136-39.

### ii. Refusing to Comply With the Public Records Law Is Not A Legislative Act To Which Immunity Attaches.

The *Brnovich* holding is no anomaly. It simply reflects the well-defined limits of legislative immunity. As this Court reiterated in *Mesnard*, "[n]ot everything done by a legislator 'in any way related to the legislative process' is afforded absolute immunity as a legislative function." 2021 Ariz. LEXIS 238, at *9 (citation omitted). The immunity does *not* attach, for example, to "administrative matters" or "other activities incidentally related to legislative affairs but not a part of the legislative process itself." *Mesnard*, 2021 Ariz. LEXIS 238, at *11 (citations omitted).

Thus, the Senate is incorrect in claiming that whether and to what extent to release records is a legislative function to which immunity attaches. Pet. at 13-15. The Public Records Law, not the whims of the Senate, individual senators or their agents, controls whether and to what extent the Senate must maintain, preserve and release public records. Such is the law, as the legislature itself has written it.

*Mesnard* does not compel a different result. *Mesnard* is inapposite because it involved a tort claim, not a special action claiming that the

Speaker of the House had unlawfully withheld any records or otherwise failed to comply with any statutory obligation. *Mesnard* does not overrule the principle in *Brnovich* that legislative immunity does not shield governmental entities from challenges to allegedly illegal actions. *See Brnovich*, 476 P.3d at 314.

This Court should deny the Petition because the Senate's arguments plainly lack merit, as every judge who heard them has ruled, and its repeated attempts to secure stays of proceedings below are having the effect, if not carrying out the design, of delaying access to public records in violation of the law's requirement that they be produced "promptly." *See, e.g.*, A.R.S. §§39-121.01(D)(1) and (E).

## Conclusion

For all of the foregoing reasons, *Amici* Phoenix Newspapers, Inc. and Kathy Tulumello respectfully request that this Court deny jurisdiction of this special action, or if it decides to accept jurisdiction, deny the Petition and its relief sought in its entirety.

Respectfully submitted this 31st day of August, 2021.

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